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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1430

RENAULT ROBINSON,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

On Appeal From The Illinois Appellate Court

JURISDICTIONAL STATEMENT

GARY M. ELDEN
200 E. Randolph Drive
Chicago, Illinois 60601
(312) 861-2192

Attorney for Appellant
Renault Robinson

THOMAS A. GOTTSCHALK
JOHN S. WILSON, JR.
200 E. Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

KERMIT COLEMAN
7126 S. Jeffery Avenue
Chicago, Illinois 60637
(312) 667-7384

Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6 3988

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1

JURISDICTION 2

ORDINANCE INVOLVED 4

QUESTIONS PRESENTED 4

STATEMENT:

1. EVIDENCE, MOTION, AND RULINGS ON DISCRIMINATORY PROSECUTION ISSUE

   Evidence of Chicago Police Department's Animus Against Robinson 5

   Actions in this Case of the City of Chicago and its Police Department 6

   Robinson's Post-Trial Motion; Rulings 7

2. EVIDENCE, MOTIONS, AND RULINGS ON THE OVERBREADTH AND VAGUENESS ISSUES

   Robinson's Conduct 8

   The Decision to Arrest 11

   Post-trial Motion; Rulings 12

THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED IN THIS CASE ARE SUBSTANTIAL

1. The discriminatory prosecution question 12

2. The overbreadth and vagueness questions 17

CONCLUSION 23

APPENDIX A: Opinion of Illinois Appellate Court .. 1a

APPENDIX B: Transcript of Trial Court's Opinion .. 13a

APPENDIX C: Illinois Supreme Court denial of petition for leave to appeal 19a

APPENDIX D: Notice of Appeal filed in Illinois Appellate Court 20a

APPENDIX E: Notice of Appeal filed in Illinois Supreme Court 21a

APPENDIX F: Enactments Involved 22a

TABLE OF AUTHORITIES

Cases

Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) 15

Chicago, Burlington & C. Rd. v. Chicago, 166 U.S. 226, 231 (1897) 15

City of Chicago v. Blakemore, 15 Ill.App.3d 994, 305 N.E.2d 687 (1974) 19

City of Chicago v. Perez, 45 Ill.2d 258, 260, 259 N.E.2d 4, 5 (1970) 20

City of Chicago v. Wender, 46 Ill.2d 20, 23, 262 N.E.2d 470, 472 (1970) 17, 19

City of Cleveland v. Anderson, 234 N.E.2d 304, 308-309 (Ohio App. 1968) 21

Cohen v. California, 403 U.S. 15, 19, 20, 21 (1971) 2, 18

Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968) 2, 3, 14, 15

Grayned v. City of Rockford, 408 U.S. 104, 111 (1972) 17

Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) .. 2, 20

Henry v. Mississippi, 379 U.S. 443, 446-449 (1965) 16

King Manufacturing Co. v. City Council of Augusta, 277 U.S. 100 (1928) 3

Kirkwood v. Loeb, 323 F.Supp. 611, 615 (W.D. Tenn. 1971) 21

Lewis v. City of New Orleans, 415 U.S. 130, 132, 135 (1974) 2, 19

Minneapolis, St.P. & S.S.M.R. Co. v. Rock, 279 U.S. 410, 411 (1929) 3

N.A.A.C.P. v. Alabama, 357 U.S. 449, 455-458 (1958) .. 15

Neal v. Still, 455 S.W.2d 921, 922 (Ark. 1970) 19

Norwell v. City of Cincinnati, 414 U.S. 14, 16 (1973) 2, 18, 21

O'Connor v. Ohio, 385 U.S. 92 (1966) 16

Oratowski v. Civil Service Comm'n, 3 Ill.App.2d 551, 561, 123 N.E.2d 146, 151 (1954) 19

Phillips v. Borough of Folcroft, Pennsylvania, 305 F. Supp. 766, 769 (E.D. Pa. 1969) 21

Robinson v. Conlisk, 385 F.Supp. 529, 540, 543 (N.D. Ill. 1974), 395 F.Supp. 329 (N.D. Ill. 1975) 6

Shatz v. Paul, 7 Ill.App.2d 223, 237, 129 N.E.2d 348, 355 (1955) 14

Town of Honea Path, S.C. v. Flynn, 176 S.E.2d 564, 567 (S.C. 1970) 21

United States v. City of Chicago, 385 F.Supp. 540, 543 (N.D. Ill. 1974), 395 F.Supp. 329 (N.D. Ill. 1975) 6

United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972) 2, 12

United States v. Falk, 479 F.2d 616 (7th Cir. 1973) .. 2, 12

Virginian R. Co. v. Mullens, 271 U.S. 220, 222 (1926) 3

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 15

Miscellaneous

Ill.Rev.Stat., ch. 38, § 12-6(a)(6) 13

• Ill.Rev.Stat., ch. 110, § 68.1(2) 7, 15

Ill.Rev.Stat., ch. 110A, §§ 315, 317 2

• Municipal Code of the City of Chicago, ch. 193
§193-1(a) 2, 4, 10, 17

§193-1(c), (d) 20

§193-1(h) ..... 10, 21 n. 6

§193-1.4 20

28 U.S.C. §1257(2) 2, 3

Canons of Ethics, Canon 7, DR 7-105 (A) 14

2 Wharton, CRIMINAL LAW, ch. 33, § 807 at p. 663 19

• Reproduced in Appendix F, below.

IN THE

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OCTOBER TERM, 1975

No.

RENAULT ROBINSON,

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vs.

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Appellee.

On Appeal From The Illinois Appellate Court

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Illinois Appellate Court's opinion, 32 Ill. App. 3d 149, 336 N.E. 2d 158 (1975), is Appendix A, below. A transcript of the trial court's oral opinion (with accompanying colloquy) is Appendix B, below. The Illinois Supreme Court denied appellant's petition for appeal as of right or in the alternative for leave to appeal. This denial was promulgated only in the form of a letter (Appendix C, below).

JURISDICTION

Appellee City of Chicago charged appellant Renault Robinson under the City's disorderly conduct ordinance, Municipal Code of the City of Chicago, ch. 193, § 193-1(a). On February 26, 1973, the trial court entered judgment for the City and fined Robinson $200. On September 9, 1975, the Illinois Appellate Court affirmed that judgment. On January 23, 1976, the Illinois Supreme Court denied appellant's petition for appeal as of right or alternatively for leave to appeal, which had been filed pursuant to Ill. Rev. Stat., ch. 110A, §§ 315, 317. Appellant filed notices of appeal to the United States Supreme Court in the Illinois Appellate Court on February 23, 1976, and in the Illinois Supreme Court on February 25, 1976. (These notices of appeal are Appendixes D and E, below.)

The Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction can be organized under four propositions. (1) Robinson presents a substantial federal question by his claim that Chicago's disorderly conduct ordinance is unconstitutionally vague and overbroad as applied. *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974); *Gregory v. City of Chicago*, 394 U.S. 111 (1969). (2) Robinson presents a substantial federal question by his claim that the ordinance was unconstitutionally used as a vehicle for a discriminatory prosecution. *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973); *Dixon v. District of Columbia*,

394 F.2d 966, 968 (D.C. Cir. 1968). (3) Appellant's challenge to Chicago's municipal ordinance satisfies the requirement of 28 U.S.C. § 1257(2) that a case must draw in question "the validity of the statute of any state." *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100 (1928). (4) The instant decision of the Illinois Appellate Court is appealable under 28 U.S.C. § 1257 as a final judgment "rendered by the highest court of a state in which a decision may be had" inasmuch as appellant duly attempted by all available procedures to secure further review by the Illinois Supreme Court and was unsuccessful. *Minneapolis, St. P. & S.S.M.R. Co. v. Rock*, 279 U.S. 410, 411 (1929); *Virginian R. Co. v. Mullens*, 271 U.S. 220, 222 (1926).

ORDINANCE INVOLVED

Appellant challenges the constitutionality of Section 193-1(a) of chapter 193 of the Municipal Code of the City of Chicago (loose-leaf pages in official version not numbered consecutively), which provides: "A person commits disorderly conduct when he knowingly: (a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace." (Appendix F, below, sets out the foregoing provision in context with other sections of the Municipal Code.)

QUESTIONS PRESENTED

1. Whether Chicago's disorderly conduct ordinance was administered in such a discriminatory manner in this case as to render appellant's conviction unconstitutional.

2. Whether Chicago's disorderly conduct ordinance is void for vagueness and overbreadth as applied in this case.

STATEMENT

1. EVIDENCE, MOTION, AND RULINGS ON DISCRIMINATORY PROSECUTION ISSUE

Evidence Of Chicago Police Department's Animus Against Robinson

Appellant Renault Robinson was founder and first president of the Afro-American Patrolmen's League, an organization of black Chicago policemen often critical of the Chicago Police Department and the City government. (A. 37.)[1] During his first four years on the force, before the League was founded, Mr. Robinson had a model record. He was awarded 20 written commendations for outstanding performance. He was never accused of any disciplinary infraction. (A. 36-37.) After the League was founded in May 1968, Mr. Robinson began to be reprimanded, suspended, punished, and charged with infractions of Police Department rules and City ordinances on an almost continuous basis. (A. 38-44, 16.) He was given less desirable assignments. (A. 37.) His superiors told him that the Department was opposed to the League. (A. 37.) He was punished once for criticizing racial discrimination in the Department on a radio news program. (A. 16, 41-44.)

In 1970, Robinson brought a civil rights suit against the Police Department, its Superintendent, and its

[1] Citations beginning with an upper case "A" refer to the Abstract of Record filed in the Illinois Appellate Court. A certified copy of that Abstract was filed with this Jurisdictional Statement. The six Appendixes (A through F) bound herewith are cited in the following form: "App. ....., p. .....a." The appendix pages are numbered consecutively from 1a through 24a.

Review Board. (A. 18.) Six years of strenuous litigation ensued, resulting in landmark civil rights opinions which: found that the Chicago Police Department had intentionally discriminated against blacks and other minorities; enjoined such conduct in the future; required institution of new hiring and promotional procedures; and stopped Chicago's revenue sharing funds until the foregoing reforms were implemented.[2] The City and its Police Department showed great hostility to Robinson because of these lawsuits and attempted to intimidate Robinson into dropping the lawsuits. (A. 16-17.)

Actions In This Case Of The City Of Chicago And Its Police Department

In 1970, the City brought this case against Robinson for disorderly conduct. After a first trial had resulted in a hung jury, the City's prosecutor stated to Robinson that the City would discontinue the disorderly conduct prosecution if Robinson abandoned his federal civil rights suit. (A. 16-17.) In its briefs and oral argument before the Illinois Appellate Court, the City admitted the foregoing, characterizing its actions as an "offer" and as an "attempt at compromise or settlement." (See App. A, p. 5a.) Mr. Robinson refused the City's offer and the City thereupon retried the case, using six witnesses and compiling a transcript of over 600 pages. (The maximum penalty under the ordinance was $500.)

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[2] In 1973, the Justice Department joined as a plaintiff in Mr. Robinson's suit after independent federal agencies had upheld charges of racial discrimination made by Mr. Robinson to those agencies. Of the three major opinions thus far issued in the federal litigation, two have been published under the combined caption *United States v. City of Chicago, Robinson v. Conlisk*, 385 F. Supp. 543 (N.D. Ill. 1974) and 395 F. Supp. 329 (N.D. Ill. 1975). See also the procedural opinions at 385 F. Supp. 529 and 540 (N.D. Ill. 1974). Several important issues still await resolution.

Five veteran Chicago policemen, experienced in disorderly conduct arrests, stated in affidavits that the Chicago Police Department would ordinarily not prosecute the type of conduct which led to Mr. Robinson's arrest. (A. 45-53.) The City filed no counter-affidavits disputing the five police affidavits.

Robinson's Post-Trial Motion; Rulings

All of the above facts were stated in Mr. Robinson's ten-page post-trial motion (A. 5-15) filed pursuant to Section 68.1 of the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, § 68.1. (App. F, p. 24a.) The motion was supported by 38 pages of affidavits. (A. 16-54.) On the day the motion was orally argued, Robinson's attorney moved for the right to file further papers and offered to present live witnesses in support of the motion. (App. B, pp. 15a, 17a.) The City presented no paper in opposition to the motion and opposed any further proceedings. Accordingly, the trial judge considered the matter on the record before him and decided on the merits that the above facts did not constitute a *prima facie* case of discriminatory prosecution. (App. B, pp. 15a-16a.) The City made no objection in the trial court to the form of any part of the post-trial motion or any affidavit filed by Robinson. The trial court specifically held that the record was complete and that Robinson had preserved all points raised in the post-trial motion, including the discriminatory prosecution issue. (App. B, p. 15a.) The Appellate Court affirmed the trial court, holding that Robinson had not shown discriminatory prosecution and that, alternatively, Robinson had waived the issue by not making "pre-trial motions or offers of proof." (App. A, pp. 9a-10a.)

2. EVIDENCE, MOTIONS, AND RULINGS ON THE OVERBREADTH AND VAGUENESS ISSUES

Robinson's Conduct

The prosecution's witnesses described the conduct which led to Robinson's arrest in the following manner (testimony by defense witnesses, who denied much of what follows, is not stated herein if it is contradicted in any way by any prosecution witness).

The Young Artists' Studio (a part of the Goodman Theatre) presented a mixed media satire on Chicago government (A. 69) containing film contributed by Renault Robinson as representative of the Afro-American Patrolmen's League (A. 148-149). The producer of the presentation sent Robinson free tickets to the performance with a letter thanking him for his assistance. (A. 149.)

Since Robinson was working at community meetings until 7:00 p.m. the day of the performance (A. 128), he did not arrive at the production until 10:00 p.m., shortly before the first intermission. He arrived with his wife and a friend, Nathan Silas. Robinson gave three tickets to the ticket taker, who accepted them without question. (A. 96-97.) Pursuant to the ticket taker's request, the three then waited in the lobby until the intermission. According to the ticket taker, they were "very polite." (A. 89.)

As a member of the Chicago Police Department, Nathan Silas was required to carry one or more guns on his person even when not in uniform. (A. 4.) (Since Mr. Robinson was then on suspension, this rule did not apply to him on the day in question.) The ticket taker thought he saw a gun in Mr. Robinson's belt when Mr. Robinson

reached into his pocket for the theatre tickets. (A search 30 minutes later disclosed that neither Mr. nor Mrs. Robinson possessed a gun and that Silas possessed two guns. (A. 112-113, 119.) The police never charged anyone with illegal possession or display of a gun. (A. 2.)) Because the ticket taker thought he saw a gun, he called the police.

When the intermission began, over 800 people came into the lobby. (A. 93.) The Robinson party mixed with the crowd. Mr. Robinson met one of the men who had invited him. The man said: "Well, I'm very glad you could make the performance." They exchanged a few words, and the man concluded: "Thank you for coming." (A. 152.) The Robinson party did nothing during the intermission that aroused anyone's attention. (A. 93.)

When the intermission ended, the Robinson party entered the studio theatre. (A. 94.) They waited until most other people had gone into the theatre so that they could readily determine what seats were available. (A. 129.) The police arrived in the lobby before the intermission ended. (A. 93.) No one said anything to the Robinson party then.

After the Robinson party had begun to walk down the aisle of the studio theatre looking for seats, a white plainclothes person (Officer Dillan), *not identifying himself as a policeman* (A. 113), approached the Robinson party in the dark (A. 113) from behind (A. 108). Thinking that Mr. Robinson might be handing a gun to Mrs. Robinson, he grabbed Mr. Robinson's hand. (A. 109, 113.) As a result, Officer Dillan pushed or fell against Mrs. Robinson (A. 109, 116), causing her to fall against a wall or an aisle seat. (A. 116.) Unknown to the policeman, but known to Renault Robinson, Mrs. Robinson had just had a serious hip operation. (A. 127.) Mr.

Robinson became upset when his wife was jostled and said to Nathan Silas words to the following effect: "Who is that white motherfucker in the blue sportcoat who pushed my wife?" (A. 109.)[3]

Within a minute or two after this incident, the Robinson party voluntarily and without any resistance went into the lobby of the theatre to talk to the policemen. By this time, a uniformed policeman had briefly explained the "man-with-gun" complaint to Robinson. As soon as he reached the lighted lobby of the theatre, Robinson opened his coat and showed that he had no gun. (A. 129, 133, 154.) The police never charged Robinson or anyone else with unauthorized carrying of a dangerous weapon, which is covered by Section (h) of the very ordinance under which Robinson was charged. He was charged only under Section (a). (A. 2.)

Robinson talked in the lobby for three to five minutes to one policeman and then for several minutes to Sergeant Clancy (later to be the arresting officer). (A. 111.) Robinson twice walked away from Sergeant Clancy and attempted to go back and watch the play. Robinson raised his voice occasionally and made one profane statement, but generally his discussion was so quiet it could not be heard by policemen 16 to 20 feet away. (A. 110-111.) The conversation consisted primarily of Clancy's demands that the Robinson party leave the premises and the Robinson party's refusal to do so.

[3] Defendants denied much of this. However, for purposes of appeals in this case, the evidence most favorable to the prosecution is assumed to be true.

The Decision to Arrest

By the time Sergeant Clancy decided to arrest Robinson, Sergeant Clancy had determined the following: (a) Robinson was a longstanding member of the Chicago Police Department (A. 104, 109, 115); (b) he had been given tickets to the theatre by "the manager of the place," who knew Robinson personally (A. 121, 106); (c) Robinson did not have a gun (A. 112, 119); (d) even if he had a gun he would not be a dangerous person since he was a policeman and therefore he was ordinarily required by law to carry a gun (A. 4); (e) neither Robinson nor Silas had been the least bit violent or menacing.

Sergeant Clancy nevertheless arrested Robinson, Silas, and Mrs. Robinson solely because they would not obey Clancy's order to leave the theatre. The police never gave a reason for their orders to leave the theatre. (A. 129-130, 134-135, 145-146, 155.) In response to such orders, Robinson and his two companions stated: "We have a right to be here [in the theatre], and if [we] are going to leave, you are going to have to arrest [us]." (A. 107.) Sergeant Clancy thereupon turned to one of the attendants at the Goodman Theatre and stated: "Well, this thing has gotten out of hand. Is there anyone here who would sign a complaint?" (A. 64.) One of the parking lot attendants (also a security officer) at the theatre agreed to come down to the station and sign the complaint at the request of Sergeant Clancy. (A. 64.) Sergeant Clancy testified that the sole reason for the arrest was Robinson's refusal to leave the theatre. (A. 105, 107.) Sergeant Clancy and the other officers had come to the theatre solely because of a complaint concerning a man with an illegal gun. (A. 105, 108.) They never found that man with a gun. (A. 112.)

Post-Trial Motion; Rulings

In his post-trial motion, Robinson urged that the relevant ordinance section would be unconstitutionally overbroad and vague if construed to penalize the above actions. Robinson set forth in his post-trial motion a detailed legal and factual argument (complete with citations of legal authority) on each constitutional point he raised. (A. 6-13.) Robinson made essentially the same legal arguments and cited the same authorities to the Illinois Appellate Court and Illinois Supreme Court. (The same arguments and citations again appear in the next section of this jurisdictional statement.) The trial court specifically referred to Robinson's overbreadth and vagueness arguments and rejected those arguments; see App. B, pp. 14a-15a. The Appellate Court did the same; see App. A, pp. 7a-8a.

THE FEDERAL CONSTITUTIONAL QUESTIONS PRESENTED IN THIS CASE ARE SUBSTANTIAL

1. THE DISCRIMINATORY PROSECUTION QUESTION

Under two federal cases directly in point, a defendant proves a *prima facie* case of discriminatory prosecution if he shows (1) that the government has a motive to prosecute him in a discriminatory fashion and (2) that the government has left unprosecuted similar conduct by others. Thereafter the burden of proof shifts to the government to explain its conduct, which is fair since the government has exclusive access to the relevant information. *United States v. Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972). *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

The Illinois Appellate Court's opinion that Robinson failed to make a *prima facie* case here is in direct conflict with the *Crowthers* and *Falk* cases. Robinson presented uncontradicted evidence on both elements of his *prima facie* case: (1) Robinson showed that he and a group which he founded and led were critical of the Police Department and that the Department both previously and subsequently attempted to harass and intimidate him. (2) Five experienced police officers swore, without contradiction, that numerous similar (and more serious) cases of arguable disorderly conduct were not prosecuted by the City of Chicago because they were so trivial and so uneconomic to pursue. (A. 45-53.) Each policeman gave his expert opinion that the extremely zealous pursuit of this one case, notwithstanding the insignificant violation and fine at stake, could only be interpreted as an attempt by the Chicago Police Department to harass Robinson.

This was more than was required, under the cited cases, to shift the burden of proof to the City. In addition, however, Robinson proved that the City sought to use the threat of continuing the instant prosecution as a means of coercing Robinson into dismissing a federal civil rights suit against the Police Department. On appeal, the City admitted this attempted coercion, describing it as "an attempt at compromise or settlement." Such conduct constitutes the commission of a felony, Ill. Rev. Stat., ch. 38, § 12-6 (a)(6)[4]; a violation of

[4] "§ 12-6. **Intimidation.** (a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to . . . (6) Take action as a public official against anyone or anything, or withhold official action, or cause such action or withholding . . . ."

the Canons of Ethics, Canon 7, DR 7-105(A)[5]; a constitutional violation which taints and requires dismissal of any resulting conviction, *Dixon v. District of Columbia*, 394 F.2d 966, 968 (D.C. Cir. 1968) (prosecution "admitted to" what the court termed "a gross abuse of discretion" in prosecuting a defendant who would not drop his suit against policemen); and an abuse of process under Illinois law, *Shatz v. Paul*, 7 Ill. App. 2d 223, 237, 129 N.E. 2d 348, 355 (1955). The City's "attempt to compromise or settle" is compelling evidence that the true motive of the prosecution here was not a desire to deter, rehabilitate or punish a man thought to be a criminal, but a desire to intimidate a critic of the Police Department and to chill his exercise of constitutional rights. This is a far stronger *prima facie* case than in any reported precedent.

The City made no attempt to introduce any factual rebuttal to this *prima facie* case. Indeed, it resisted defendant's motion to give both sides an opportunity to present and cross-examine live witnesses at the trial level. (App. B, pp. 15a, 17a.) Yet the trial court, though holding the issue had been preserved and that the record was complete, decided that the City did not violate Robinson's constitutional rights. (App. B, pp. 15a-17a.)

The Appellate Court not only incorrectly affirmed the trial judge on the merits; the Appellate Court also held, in the alternative, that Robinson waived his claim of discriminatory prosecution because he did not proceed by

[5] "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

"pre-trial motions or offers of proof." (App. A, pp. 9a-10a.) That is not an adequate state ground for affirmance. Robinson's 38 pages of affidavits (accompanied with a request to present live testimony) constitutes as complete an "offer of proof" as can be imagined.

The appellate court's statement that a defendant must raise a discriminatory prosecution claim before trial is not supported by any prior case, rule, or statute. On the contrary, in *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), the facts surrounding the discriminatory prosecution claim were first brought out at a post-trial conference. *Id.* 967. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the discriminatory prosecution claim was first raised after judgment. *Id.* 356-357. Section 68.1(2) of the Illinois Civil Practice Act, Ill. Rev. Stat., ch. 110 (App. F, p. 24a), provides that a request for judgment notwithstanding an adverse jury verdict must be sought by a post-trial motion. In the absence of a specific state requirement that a federal constitutional issue be raised prior to trial, a party adequately preserves his constitutional claim by urging it in a post-trial motion. *Chicago, Burlington & C. Rd. v. Chicago*, 166 U.S. 226, 231 (1897) (holding that federal constitutional issue was properly preserved if raised in motion for new trial; reversing Illinois state court ruling that issue had been waived). Invalidating on appeal an apparently proper procedure for raising a constitutional objection is a deprivation of due process. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455-458 (1958); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

There is no legitimate state interest in making a pre-trial motion the exclusive means of raising a discriminatory prosecution claim. Until the prosecution

presents its full case, a defendant often will not know whether he can prove one crucial matter—that the government does not normally prosecute conduct "similar" to that proven against the defendant at trial. In the instant case, at the time a pre-trial motion had to be filed, the City had not yet made its "attempt to compromise and settle" the case and stated its intention to prosecute unless Robinson dropped his federal suit. Accordingly, that extremely important point could not have been raised in a pre-trial motion. A discriminatory prosecution claim is determined by the judge and not the jury in any event. The conduct of any trial on the merits is not affected by the timing of the constitutional objection.

Robinson did not intentionally waive this important constitutional objection. All available precedents and statutes made it seem that Robinson could raise his constitutional claim by post-trial motion. A constitutional right cannot be deemed "waived" for purposes of federal law unless a defendant is affirmatively aware that he must assert a right at a particular early point in the proceedings and knowingly declines to do so. *O'Connor v. Ohio*, 385 U.S. 92 (1966). Absent a knowing waiver, and absent any legitimate state interest in barring a defendant's post-trial constitutional objection, the discriminatory prosecution issue should be held to have been fully preserved in this case as a matter of federal law. *Henry v. Mississippi*, 379 U.S. 443, 446-449 (1965) (defendant, charged with breaching the peace, raised constitutional objection after trial; held, properly preserved subject to remand on issue of intentional waiver notwithstanding failure to follow usual state procedures).

2. THE OVERBREADTH AND VAGUENESS QUESTIONS

The ordinance subsection under which Robinson was charged provides: "A person commits disorderly conduct when he knowingly (a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace." Previous Illinois cases had held that such language covers only acts of violence or acts creating an "imminent threat of violence." *See, e.g., City of Chicago v. Wender*, 46 Ill. 2d 20, 23, 262 N.E. 2d 470, 472 (1970) (Similar ordinance language "includes not only violent acts but acts and words likely to produce violence in others.") In *Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972), the Court upheld another Illinois city's ordinance only because of such past judicial glosses:

> Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase "tends to disturb." However, in *Chicago v. Meyer*, 44 Ill. 2d 1, 4 . . . and *Chicago v. Gregory*, 39 Ill. 2d 47 . . ., the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia*, a "diversion tending to disturb the peace," and held that it permitted conviction only where there was "*imminent* threat of violence." (Emphasis supplied by the Court.)

The City of Chicago did not urge in this case that Robinson created violence or an imminent threat of violence. The City claimed primarily that Robinson swore at a policeman, rudely walked away from a policeman (after answering questions for five to ten minutes), and "disturbed the peace" of people watching a play by participating in an argument with the police instead of leaving a public theatre, for which he held complimentary tickets, merely because the police gave

him an unexplained order to do so. Each of these claims raises serious constitutional problems.

To begin with, the First Amendment gives a citizen the right to argue with police who seek to detain and question him or who order him about. A citizen confronted by such policemen may object to their actions, refuse to cooperate, and walk away (unless, of course, a proper arrest has been effected on adequate grounds). *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973) (far ruder and less cooperative defendant held, under Constitution, not chargeable with breach of peace violation). Police cannot abrogate these constitutional rights of citizens by choosing an inconvenient place (a theatre) and time (during a play) to detain, question, and give orders to a citizen.

The right of a theatregoer not to hear another person talk in a theatre lobby during a play is of little weight when compared to the constitutionally protected right of a presumptively innocent man to demand to know the reason for unexplained detention and questioning by police and to refuse to obey an unwarranted police order to "move on." See enunciation of balancing test in *Cohen v. California*, 403 U.S. 15, 21 (1971). In any event, the instant ordinance does not create a special rule for places of public assembly, such as theatres, and such a special rule cannot constitutionally be engrafted onto the ordinance. *Cohen v. California*, 403 U.S. 15, 19 (1971).

Testimony that Robinson used profanity adds nothing to the City's case. Indeed, to the extent the trial and appellate courts in this case interpreted the Chicago ordinance to outlaw the use of profanity, the ordinance would become unconstitutionally overbroad for that reason alone. *Cohen v. California*, 403 U.S. 15, 20 (1971).

For all of these reasons, the ordinance as interpreted and applied in this case was unconstitutionally overbroad. In addition, it ran afoul of the doctrine that an ordinance "is unconstitutionally vague which imposes criminal sanction for the doing of an act, and that act is so nebulously described as to require men of common intelligence to guess at its meaning." *Neal v. Still*, 455 S.W. 2d 921, 922 (Ark. 1970). Before the Appellate Court's opinion in this case, Illinois courts consistently reversed disorderly conduct convictions as a matter of law if the convictions rested only on evidence of rudeness to or uncooperativeness with policemen, no matter how aggravated. *City of Chicago v. Wender*, 46 Ill. 2d 20, 262 N.E. 2d 470 (1970); *City of Chicago v. Blakemore*, 15 Ill. App. 3d 994, 305 N.E. 2d 687 (1974) (deploring blatant discourtesy to policemen, but holding it not proper basis for disorderly conduct conviction under Chicago ordinance). *Compare Oratowski v. Civil Service Comm'n*, 3 Ill. App. 2d 551, 561, 123 N.E. 2d 146, 151 (1954) *with Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (concurring opinion of Powell, J.) See 2 Wharton, CRIMINAL LAW, Ch. 33, § 807 at p. 663:

> The utterance of abusive, profane, or insulting language not accompanied by an immediate threat of violence is not indictable at common law as a breach of the peace.

No lawyer or layman examining the relevant ordinance provision in light of the prior case law would have anticipated the incredibly broad interpretation given that provision in this case.

The problems of unconstitutional vagueness and overbreadth were compounded by the fact that the police, the prosecutor, and the courts all relied on other *uncharged* conduct of Robinson to support his conviction.

The police arrested Robinson only because Robinson refused to leave the theatre. However, the police did not charge Robinson under the Chicago ordinance penalizing any person who "knowingly . . . (b) Remains upon the property, or any part thereof, of another after receiving notice, either oral or written, from the owner or occupant to depart." Municipal Code of the City of Chicago, ch. 193, § 193-1.4; see *City of Chicago v. Perez*, 45 Ill. 2d 258, 260, 259 N.E. 2d 4, 5 (1970) (reversing conviction because defendant's refusal to leave property on request, even if it constituted trespass and even if it was accompanied by disruptive and impolite conduct, did not violate "breach of the peace" ordinance, the sole ordinance under which defendant had been charged).

Nor was Robinson charged under ordinance Sections (c) and (d), which require a person to obey certain police orders to leave an area. Municipal Code of the City of Chicago, ch. 193, §§ 193-1(c) and (d); see App. F, p. 22a. A general disorderly conduct ordinance cannot constitutionally be construed to cover a refusal to disperse upon police order. *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969):

> [P]etitioners were arrested for disorderly conduct. . . . [P]etitioners were convicted . . . for their refusal to disperse when requested to do so by Chicago police. . . . As we said in *Garner v. Louisiana*, 368 U.S. 157, 164 (1961): "[I]t is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."

See also *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973.)[6]

A lawyer or layman reading Chicago's ordinances in light of the relevant case law could not guess that the provision in question here would be read so broadly as to penalize conduct treated in other ordinance sections (without the limitations provided in those sections; see App. F, pp. 22a-23a). Such a "catch-all" general section cannot constitutionally be given such an all-encompassing interpretation. See *Kirkwood v. Loeb*, 323 F.Supp. 611, 615 (W.D. Tenn. 1971).

A primary reason for requiring narrow and specific disorderly conduct ordinances is to prevent potential discriminatory and abusive use of the ordinances. *City of Cleveland v. Anderson*, 234 N.E. 2d 304, 308-309 (Ohio App. 1968). Accordingly, the vagueness and overbreadth issue in this case cannot totally be separated from the strong evidence here of discriminatory prosecution. *Phillips v. Borough of Folcroft, Pennsylvania*, 305 F.Supp. 766, 769 (E.D. Pa. 1969): "This evidence, tending to show uneven application of the ordinance, illustrates the potential for the arbitrary exercise of the police power which is latent in the ordinance. It is therefore of some assistance in deciding the issue of vagueness." On facts strikingly similar to those in the instant case, the court held in *Town of Honea Path, S.C. v. Flynn*, 176 S.E. 2d 564, 567 (S.C. 1970):

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[6] Along the same lines, the Appellate Court may have upheld Robinson's conviction due to the possibility "that defendant possessed a gun" (App. A, p. 7a), although Robinson was not charged under Section (h) of the ordinance in question, which specifically covers such matters. (See App. F, p. 23a.) The police had testified that they did not arrest Robinson or anyone else for illegal possession of a gun. (A. 112; see A. 2.) See *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973).

> The facts of the instant case rather forcefully demonstrate the fundamental reasons why the particular ordinance is constitutionally invalid. . . . [T]he conviction under this ordinance may well have rested upon nothing more than mere words uttered by the appellant which were not pleasing to the local police officers who obviously did not like anyone questioning or challenging their authority.

The appellate opinion in this case cites no federal cases supporting the federal constitutional interpretations made and offers little or no basis for distinguishing the controlling cases cited above, including recent opinions of the Court. At a minimum, the appellate opinion raises substantial federal constitutional questions. At a maximum, it should be summarily reversed because it cannot be reconciled with settled legal doctrines.

CONCLUSION

For these reasons, we request a plenary hearing before the United States Supreme Court or, in the alternative, a summary reversal of the Illinois Appellate Court and entry of judgment for defendant.

Respectfully submitted,

GARY M. ELDEN
200 E. Randolph Drive
Chicago, Illinois 60601
(312) 861-2192

Attorney for Appellant
Renault Robinson

THOMAS A. GOTTSCHALK
JOHN S. WILSON, JR.
200 E. Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

KERMIT COLEMAN
7126 S. Jeffery Avenue
Chicago, Illinois 60637
(312) 667-7384

Of Counsel

APPENDIX

APPENDIX A

Opinion Of Illinois Appellate Court
32 Ill.App.3d 149, 336 N.E.2d 158 (1975)

THE CITY OF CHICAGO, Plaintiff-Appellee, *v.* RENAULT ROBINSON, Defendant-Appellant.

(No. 58942; Judgment affirmed.)

First District (2nd Division)—September 9, 1975.

Mr. PRESIDING JUSTICE DOWNING delivered the opinion of the court:

Defendant, Renault Robinson, and a companion, Nathan Silas, both Chicago policemen, were charged with disorderly conduct in violation of section 193—1(a) of the Chicago Municipal Code.[1] After a first trial ended in a hung jury, a second jury found defendant guilty and Silas not guilty. Defendant was fined $200 plus costs of $10. Defendant's post-trial motion for judgment notwithstanding the verdict on evidentiary, constitutional and abuse of process grounds was denied. This appeal is from that denial and from the judgment entered on the verdict.

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[1] The applicable section reads as follows:

"193—1. A person commits disorderly conduct when he knowingly:

(a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of the peace; * * *

* * *

A person convicted of disorderly conduct shall be fined not less than $5.00 nor more than $500.00 for each offense."

On appeal, defendant contends:

(1) the city did not prove that defendant "knowingly" performed an act "in such an unreasonable manner as to provoke • • • a breach of the peace";

(2) that convicting him under this ordinance renders the ordinance void for vagueness and overbreadth as applied; and

(3) that the ordinance was applied in this case in such a discriminatory manner as to render defendant's conviction unconstitutional.

The form complaint, in pertinent part, charges:

> "*Dean Welshhons* complainant, now appears before the Circuit Court of Cook County and states that *Robison* [*sic*] *Renault* has, on or about *9 May 70* at *151 E. Monroe* Chicago, Cook County, Illinois Committed the offense of Disorderly Conduct in that he knowingly
>
> ☒ a) Did any act in such unreasonable manner as to provoke, make or aid in making a breach of peace." (Underscored matters filled in.)

THE TRIAL EVIDENCE

The evidence established that, on the evening of May 9, 1970, the Young Artists Studio presented a mixed media satire at the smaller (hereinafter studio) of the two theatres at the Goodman Theatre (hereinafter Goodman) in downtown Chicago. The satire included film contributed by the defendant as a representative of the Afro-American Patrolman's League,[2] in return for which the management had provided defendant with four complimentary tickets. Defendant and his wife were planning to go to the satire with two friends. The friends having not shown up, defendant and his wife were driven to the Goodman by another friend, Nathan Silas, in whose car they arrived at the theatre parking lot shortly before 10 p.m. The car was parked in a place allowed by Dean Welshhons, the chief of security for the Goodman, who then gave defendant's party directions to the Goodman. Welshhons then called Russell Tutterow, the Goodman manager who was taking tickets at the door. A defense objection to inquiries concerning why Welshhons had called Tutterow was sustained. Welshhons testified he observed all three members of the party to be amiable and in good spirits.

By the time defendant, his wife and Silas arrived at the Goodman lobby, the performance in the studio—and in the larger theatre where

[2] The Afro-American Patrolman's League is an organization of black policemen in the City of Chicago. The organization was founded in May, 1968, by defendant who served as its first president.

a play was being presented (hereinafter theatre)—had long since commenced. Tutterow testified that, when he asked defendant for the party's tickets, defendant spoke with a "slurred" diction and appeared to have been drinking. Defendant, he further testified, in looking for the tickets in his pants pockets, had pulled back his suitcoat revealing a gun stuck in the waistband of his pants. Tutterow asked the party if they would wait ten minutes until intermission which they said they would do. Defendant testified that he, his wife and Silas did briefly enter the studio prior to intermission.

Tutterow called Welshhons. An objection to the content of that conversation was also sustained. Welshhons subsequently called the police and later proceeded to the Goodman. The police arrived, as did Welshhons, before intermission ended. During intermission 700 people from the theatre and 150 from the studio came into the lobby. After intermission defendant's party entered the studio to look for seats, having waited, defendant testified, until most of the people had returned to their seats. The party encountered difficulty in finding seats.

When the City of Chicago police arrived, Tutterow described the defendant to the police who then entered the studio where the party was looking for seats. The participating officers testified that an Officer Stanley, who claimed to know the defendant and who did not testify at trial, volunteered to speak to defendant to "see if he could talk him out of the [studio] theatre." After Stanley greeted the defendant and shook hands, an Officer Dillan, dressed in plainclothes, thought he observed defendant passing a gun to his wife and, therefore, without identifying himself, grabbed defendant's hand. In so doing Dillan fell against defendant's wife causing her to stumble and fall against an aisle seat. Dillan testified Mrs. Robinson did not fall. Defendant, aware that his wife had a year earlier fractured her hip—for which she was still receiving medical treatment—exclaimed, apparently to Silas, "Who was that white mother fucker in the blue sportscoat who pushed my wife?"

Defendant testified that after this incident, Stanley asked him to go into the lobby which he proceeded to do. Defendant and his wife both testified that in the lobby when Stanley told him of the "man-with-a-gun" complaint, defendant opened his coat to show that he had no gun. Sergeant Clancy, the arresting officer, testified that when he arrived at the Goodman, defendant was talking with Stanley in the lobby in the presence of several other officers. Clancy further testified that he went up and asked Robinson and Silas if they were police officers and, if so, to produce credentials. Robinson refused to respond to either of these requests, whereas Silas, though he did not produce credentials, did tell Clancy he was a police officer. Stanley informed Clancy that Robinson

was a police officer and head of the Afro-American Patrolman's League.

After intermission, assuming from the lack of available seats in the studio that they had been in the wrong theatre, the party proceeded into the theatre where a dramatic presentation was in progress. Tutterow followed defendant into the theatre and asked him to leave, to which request defendant did not respond. Tutterow then went out into the lobby where he asked the police to tell defendant to leave. Police officers then entered the theatre where Sergeant Clancy gave defendant three direct orders to leave. Defendant did not respond to any of these orders.

After a few minutes, defendant, his wife and Silas did go out into the lobby where defendant engaged in a conversation with the police officers. During the 20 minutes the conversation ensued, defendant remarked to Sergeant Clancy, "What do you need all these fucking pigs for just the two of us?" apparently referring to the ten to fifteen police officers assembled there. Defendant made this remark in a voice loud enough for more than one witness to testify to it.

William Reid, a security guard for the Goodman, testified that defendant had "on two occasions walked away [from the police officers] and pulled open the doors to the big theater, so that the noise went in and people came out asking what was wrong," that, in the process, defendant shouldered him aside, though Reid was dressed in a uniform, and that defendant told him to "[g]et out of the way." Welshhons, in his testimony, concurred that patrons came out of the theatre at this time and stood in the entrance of the theatre "watching the action." Welshhons additionally testified to hearing defendant, while talking with the officers, say "take your hands off me, you white mother fucker."

Sergeant Clancy informed the defendant of the nature of the complaint—that a man fitting his description had been observed carrying a gun. Witnesses for the City testified that defendant was not responsive after being so informed. Sergeant Clancy also informed defendant's party that the management would press charges if they refused to leave. Since they continued to persist in their refusal, Welshhons volunteered, on Clancy's request, to sign a complaint. Thereupon defendant and Silas were placed under arrest, and along with defendant's wife, were all searched. No guns were found on either of the Robinsons, but two guns were found on Silas.

Allegations Made in the Post-Trial Motion

In defendant's post-trial motion for judgment notwithstanding the verdict, he contended, for the first time, that the prosecution of the present case resulted from defendant's prior history of strained relations with the police department as president and founder of the Afro-American

Patrolman's League. Defendant also alleged that the prosecutor for the City had offered to drop the charge if defendant would voluntarily dismiss the civil rights suit he and the league then had pending against the City of Chicago, the Police Review Board of the City of Chicago and other named parties.[3] Additionally, defendant attacked the conviction both on constitutional and evidentiary grounds.

In aid of his first contention, defendant submitted affidavits and exhibits which had been entered in support of the Federal suit. These affidavits and exhibits detailed defendant's prior experiences with the Chicago Police Department suggesting that a large number of disciplinary actions had been taken against the defendant after his commencing involvement with the league, whereas no such actions had been taken prior to that time. In addition, defendant submitted six affidavits from Chicago police officers who alleged, based on their experience as police officers and on a summarized statement of facts, that no member of the department would have made an arrest under the circumstances stated in a statement of facts attached to the affidavits, and that they had never known of a disorderly conduct case of similar circumstances that was prosecuted to the degree that the present case was being prosecuted. The summarized statement of facts not agreed to by the City, presented a brief summary of the facts from the defendant's point of view, including the statement "[l]ater investigation showed that both guns [found on Silas] were registered in the name of the policeman who possessed them." In support of the second contention—that the City offered to drop the charge in exchange for defendant's dropping his and the league's Federal suit, defendant offered to present evidence at the post-trial motion hearing. The trial judge refused to accept this evidence, however, since he noted that the court had never previously been made aware of any such negotiations. In the briefs presented to this court, the parties elaborated on the supposed incident, with the City admitting that an "offer" was made and rejected. The City characterized its "offer to drop [a prosecution] already well under way" as an "attempt at compromise or settlement."

The record shows that the incident at the Goodman took place on May 9, 1970; and that the defendant filed his action in the Federal court on September 9, 1970, and the jury returned its guilty verdict on October 25, 1972.

The arguments defendant made as to the alleged constitutional and evidentiary deficiencies of the conviction were essentially the same as

[3] On September 9, 1970, defendant and the Afro-American Patrolman's League filed suit known as 70 C 2220 in the United States District Court for the Northern District of Illinois, Eastern Division.

those presented to this court in this appeal. The trial court denied the post-trial motion observing that there was ample evidence for the jury to convict, that the defendant was well aware of the charge and the facts under which he was charged and thus the ordinance was not void for vagueness, and that the ordinance as set forth and as applied was constitutional.

I.

● 1 We first consider whether the City failed to prove by a clear preponderance of the evidence that defendant "knowingly" committed an "unreasonable" act to make or provoke a breach of the peace as charged. Clear preponderance of the evidence is the burden by which the City must prove its case in quasi-criminal cases such as the present one. (*Ruth v. City of Abingdon* (1875), 80 Ill. 418; *City of Chicago v. Williams* (1st Dist. 1963), 45 Ill.App.2d 327, 329, 195 N.E.2d 425.) In our opinion there is ample evidence in the record to support the jury's verdict.

Defendant was charged with the violation of section 193—1(a) of the Chicago Municipal Code. In *City of Chicago v. Morris* (1970), 47 Ill.2d 226, 231, 264 N.E.2d 1, the same city ordinance was considered by our supreme court which held that "whether a violation has occurred is determined by the reasonableness of the conduct in relation to the surrounding circumstances." See also *City of Chicago v. Otten* (1st Dist. 1971), 133 Ill.App.2d 57, 60, 272 N.E.2d 844; and *United States v. Woodard* (7th Cir. 1967), 376 F.2d 136, 141.

The police had been called to the Goodman on the basis of Tutterow's belief that defendant was carrying a gun. Approximately 850 people were in the two theatres within the building. When the police informed the defendant of the nature of the complaint and that it related to a man fitting his description, defendant, according to the testimony of plaintiff's witnesses, refused to respond. Although Officer Stanley knew defendant's identity, the defendant avoided giving the police officers conducting a proper investigation the benefit of the knowledge that he was himself a police officer. There is evidence in the record from which the jury could conclude that defendant's actions caused an actual disruption of a play in progress both within the theatre and in the lobby adjoining the theatre. The evidence that the defendant refused to leave the building upon management request and police order, after being informed by the police of the man-with-a-gun complaint, the use of loud and profane language and, on two occasions, opening the doors allowing the noise of the dispute to enter, was strong evidence for the jury in arriving at its verdict.

While it is true defendant's evidence disputed the testimony that defendant possessed a gun and used profane language or a loud voice, the resolution of these conflicts was a matter for the jury. It has long been established that the credibility of witnesses and the weight to be accorded their testimony is in the province of the trier of fact. The jury was properly instructed both as to the essential elements necessary to be present before a person could be found guilty in a disorderly conduct prosecution, and that before the defendant could be found guilty, the jury must be convinced by a clear preponderance of the evidence.

● 2 Here there was adequate evidence upon which the jury could conclude that under the surrounding circumstances—a theatre with some 850 persons present, a complaint concerning a man-with-a-gun in the building, an attempt on the part of the police to investigate the complaint—the conduct of the defendant was a knowing and an unreasonable cause of a disturbance and tended to provoke a breach of peace. We find there is a clear preponderance of the evidence to support the jury verdict.

Defendant cites numerous cases wherein the courts have held that mere refusal to obey a police command, when there is no evidence of a disturbance, and that the use of abusive or profane language or mere loudness of defendant's voice, could not justify arrests for disorderly conduct and breach of peace. We have reviewed each of the cited cases, and in our opinion the factual situations are sufficiently different from the facts in this case so as to distinguish each of them. As our supreme court said in *Morris*, "disorderly conduct has never had a precise meaning in relation to specific conduct." 47 Ill.2d 226, 231.

II.

Defendant next contends that the ordinance is void for vagueness as applied to him. It suffices to note that section 193—1(a) has withstood similar attacks to its constitutionality, with an everpresent emphasis on or reference to cases emphasizing the "knowingly" and "unreasonable" requirements of the ordinance.

In *City of Chicago v. Morris*, 47 Ill.2d 226, 230-31, our supreme court upheld section 193—1(a) against a claim of a violation of the first amendment. See also *City of Chicago v. Otten*, 133 Ill.App.2d 57, 58-60; *United States v. Woodard* (7th Cir. 1967), 376 F.2d 136, 140-42; and *People v. Raby* (1968), 40 Ill.2d 392, 395-98, 240 N.E.2d 595, *cert. denied* (1969), 393 U.S. 1083, upholding the constitutionality of the Illinois disorderly conduct statute (Ill. Rev. Stat. 1965, ch. 38, par. 26—1(a)[4], virtually iden-

[4] Section 26—1(a) provided in 1965 and still provides:
"(a) A person commits disorderly conduct when he knowingly:
(1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace; * * *"

tical to the section of the ordinance in question.

Defendant strongly urges that defendant had a constitutional right to question and protest his detention, questioning by police and arrest. Defendant states "• • • the City wants to punish Robinson for exercising the same rights exercised by the defendant in *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973)." Norwell was convicted of a violation of Cincinnati's disorderly conduct ordinance in that he " 'did unlawfully and wilfully conduct himself in a disorderly manner, with intent to annoy some person.' " Norwell, a 69-year-old immigrant, was walking on the street at night, was stopped and questioned as to the reason for his presence. He protested verbally, threw off the officer's arm and continued to walk away. He was arrested for "being loud and boisterous" and for "annoying" the officer. In a per curiam opinion, the Supreme Court held that the application of the ordinance to Norwell violated his constitutionally protected right of speech, since he had been arrested and convicted merely because he verbally and negatively protested the officer's treatment of him. It is to be noted there was no abusive language or fighting words involved, nor was he arrested or convicted for the physical act of pushing the officer's arm. As the Supreme Court said, "Regardless of what the motivation • • •, it is clear that there was no abusive language or fighting words. If there had been, we would have a different case. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)." 414 U.S. 14, 16.

● 3 Defendant also cites *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780, *rehearing denied*, 404 U.S. 876 (1971), as authority that vulgar expressions are protected under the first amendment and that defendant's vulgar expressions must likewise be so protected. Cohen was convicted for disturbing the peace by wearing a jacket, in the corridor of a county court house, bearing the words "Fuck the Draft." The Supreme Court, in reversing the conviction, held the California Penal Code which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person • • • by • • • offensive conduct," is not violated by a simple public display of this single four-letter expletive. (403 U.S. 15, 26.) In our opinion neither *Norwell* or *Cohen* are applicable to the conduct of the defendant in this case when viewed in light of the surrounding circumstances, all of which bring his conduct within the provision of section 193—1(a). We hold there to be no merit to the contention that the ordinance is void for vagueness as applied to the defendant.

III.

Defendant's final contention is that the City's disorderly conduct ordi-

nance was administered as to the defendant in such a discriminatory manner as to render his conviction unconstitutional. Simply stated, defendant claims the City had ulterior motives in prosecuting this case.

This theory was first raised as part of a post-trial motion filed in the trial court on February 26, 1973, approximately four months after the jury returned the guilty verdict. To support this contention defendant filed on February 26, 1973—the date the matter was before the trial judge—affidavits, dated February 26, 1973, from six persons identified as Chicago police officers, attesting that, in consideration of the circumstances as summarized in a statement of facts upon which the affidavits are based, no officer would have made an arrest and no person, within their knowledge, had been similarly prosecuted. As stated earlier, the statement of facts contained some facts not before the jury or based in part solely on defendant's theory of the evidence.

Defendant first asserts that he was prosecuted solely because of his position with the Afro-American Patrolman's League for activities for which most persons would not have been prosecuted. Defendant did not raise this contention at any time before or during the two jury trials. Defendant also presented, as evidence in support of his motion that the prosecution was discriminatory as to him, affidavits and exhibits tending to show that a great deal of disciplinary action was taken against him only after he had begun his association with the league. It is to be noted that all of the dates referred to in defendant's allegations preceded the start of the second trial.

Defendant argues that the presentation of this evidence made out a prima facie case of discriminatory prosecution sufficient to shift the burden of persuasion to the City. In support of this contention, he cites, in his initial brief, *City of New Orleans v. Levy* (1957), 233 La. 844, 98 So.2d 210, and *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373, 30 L.Ed. 220, 6 S.Ct. 1064, and, in his reply brief, *United States v. Crowthers* (4th Cir. 1972), 456 F.2d 1074, *United States v. Falk* (7th Cir. 1973), 479 F.2d 616, and *United States v. Steele* (9th Cir. 1972), 461 F.2d 1148. In each of these cases—with the exception of *Yick Wo* which involved an ordinance found to be discriminatory as applied by the licensing board—the respective courts did find the defendant to have made out a prima facie case of discriminatory prosecution and reversed on the basis of the prosecution's failure to prove the prosecution was not discriminatory. (233 La. 843, 852-53; 456 F.2d 1074, 1078; 479 F.2d 616, 623; 461 F.2d 1148, 1152.) In each of these cases, however, the evidence upon which the reversal was based was presented at or prior to the trial, and discriminatory prosecution was, indeed, the sole or main contention of the

defendant at trial. (233 La. 843, 850-52; 118 U.S. 356, 358-59, 361; 456 F.2d 1074, 1078-79; 479 F.2d 616, 619; 461 F.2d 1148, 1152.) No case has been presented to this court which suggests that a prima facie case of discriminatory prosecution can, where defendant is aware of the basis for the claim during the trial, be presented for the first time in a post-trial motion. Such a procedure—limiting as it does the opportunity to search out the truth through witnesses, presentation of evidence and full disposition by the trial court—could only be justified if the post-trial motion was the first practical opportunity the defendant had to raise the issue after becoming aware of the basis for it. See *Missouri ex rel. Missouri Insurance Co. v. Gehner* (1930), 281 U.S. 313, 320, 74 L.Ed. 870, 50 S.Ct. 326; *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930), 281 U.S. 673, 677-78, 74 L.Ed. 1107, 50 S.Ct. 451.

● 4 Defendant asserts that the post-trial motion was the first opportunity to raise the issue after becoming aware of the "full basis" for the claim. We disagree. If the prosecution was discriminatory, defendant would or should have been aware of that motivation at or before the commencement of the first trial. Defendant was, at that time, completely cognizant of the alleged harassment to which he asserts he was being subjected by the Chicago Police Department. This awareness is evidenced by the dates on the affidavits and exhibits submitted in support of that contention and the filing, by defendant, of a Federal suit to that effect only four months after the incident. Clearly, nothing further could have constituted the demarking line of the defendant between a discriminatory and nondiscriminatory prosecution. The defendant proceeded through the second trial and his conviction before characterizing the prosecution to the court as discriminatory. We, thus, find that defendant not only did not take the first practical opportunity but actually allowed many opportunities, wholly proper to the disposition of such an issue, to pass by. The procedures used by the defendant in *United States v. Falk*, including pretrial motions and offers of proof, are examples of steps defendant could have taken both to present the contention to the trial court and preserve the issue for review. We find that defendant in the present case did not so preserve the issue.

● 5 In connection with post-trial motions for a new trial based on newly discovered evidence, our supreme court, in *People v. Baker* (1959), 16 Ill.2d 364, 374, 158 N.E.2d 1, stated:

> "[T]he new evidence must be of such conclusive character that it will probably change the result on retrial, • • • it must be material to the issue but not merely cumulative, and • • • it must have been discovered since the trial and be of such character that it could not have been discovered prior to trial by the exercise of due diligence. (*People v. Holtzman*, 1 Ill.2d 562; *People v. Harrison*, 359 Ill. 295.)"

(See also *People v. Brown* (4th Dist. 1970), 125 Ill.App.2d 336, 341-42, 261 N.E.2d 11.) It is obvious that the defendant failed to establish the requirements necessary for the trial judge to order a new trial on newly discovered evidence.

Even had defendant properly presented the issue, we would still find defendant's claim to be without merit. The affidavits of the police officers which defendant submitted in support of his contention are fatally tainted by the self-serving summarized statement of facts which includes the allegation that "[l]ater investigation showed that both guns [found on Silas] were registered in the name of the policeman who possessed them." No evidence having been presented in this regard for the consideration of the second jury, that jury was quite justified in believing that defendant had proved off the gun Tutterow had observed, to Silas. Since the affiants were not presented with an accurate statement of facts reflecting the material facts before the jury, their affidavits are fatally tainted and could not tend to prove a prima facie case. More importantly, we find sufficient evidence on the record to support this conviction and can adduce no evidence from the record that *this* prosecution—however much other aspects of defendant's professional life may have been affected—was generated by "an evil eye and an unequal hand" as condemned in *Yick Wo*. 118 U.S. 356, 373-74.

● 6 The second part of defendant's final contention rests on an alleged offer extended by the prosecution to drop the present suit in exchange for defendant and the league dropping a pending Federal suit. The fact is the Federal suit was not dropped and the instant case is based on the conduct of the defendant on May 9, 1970, which conduct the jury found violated the City disorderly conduct ordinance. We find here that defendant not only failed to make out a case of such abuse of process before the trial court, but also that defendant seems not to have taken the claim seriously himself. Once again, though the alleged offer to drop the prosecution allegedly occurred sometime between the first and second trials, defendant never mentioned this claim during the course of the trial. In his post-trial motion, as above, defendant raised the issue and attempted to introduce evidence of the abuse. The court, however, remarking that it had never heard of this alleged abuse prior to the motion, then denied the motion. Though the defendant did renew his allegation in his brief, he failed to assert before this court any evidence in support of this theory. The City, in its brief before this court, did make reference to an offer to drop prosecution, but no admission was made sufficient to

relieve defendant of his burden to show abuse of process. In light of all of the above, we find defendant did not make out a claim of abuse of process or properly present it.

We find sufficient evidence which the jury as trier of fact could have believed to be true to support their verdict against the defendant. We further find no constitutional violations either in the ordinance itself or in the method of enforcement utilized. We further find the defendant failed to present properly or make out any case of ulterior motive on the part of the City in this prosecution. As a result of these findings, we affirm the conviction below.

Judgment affirmed.

STAMOS and LEIGHTON, JJ., concur.

APPENDIX B

Transcript Of Trial Court's Opinion

The Court: Anything further, Mr. Elden?

Mr. Elden: It's just that if the court goes—if the court has decided as a matter of policy not to turn over jury verdicts, if I thought that was the policy I wouldn't be here wasting time. If the court will give serious consideration to our position, I would like to have additional time to file a brief, unless the court thinks the points are sufficiently pointed, to file affidavits and give Mr. Mooradian a time to reply and study things, and I don't think we need another oral argument but—

Mr. Mooradian: I object to that, your Honor. There is no—we went into every aspect of this thing. It's a waste of time and dilatory tactics. It should go up on appeal or ruling on it right now.

The Court: The court has considered and has heard all of the arguments presented. And as a matter of fact, has even read some of the affidavits that have been presented to me today, which arrived by messenger, undated as to when I received them. But I was handed them by the clerk.

The Court does not have a policy, or knows nothing about other judges' policy of not disturbing jury verdicts.

Mr. Mooradian: I'm going to object on that. That is counsel's opinion of what happens here.

The Court: But the Court will only speak as to its own policy.

The Court has from time to time given the defense counsel continuances so that he could review the record of—obtaining the record, and the Court has heard extensive arguments of both sides.

The Court has read the post trial motions of the defense counsel, and has looked at all the cases that the defense counsel has presented. The Court has heard the arguments of the City of Chicago, though they be oral in nature. The Court has considered all of the factors that need be considered with respect to the matter.

The Court makes the following rulings:

With respect to the defendant's motion, motion in arrest of judgment, that will be denied.

With respect to the factual situation, considering all of the facts, I think there was ample evidence for a jury to decide the question of fact. And the Court feels that the defense counsel and defendant was given ample opportunity to present his case before the jury and there was sufficient evidence before the jury to decide the question of facts and the jury was the best judge of deciding the question of facts.

The Court rules there was ample evidence for a jury to make a determination as to a violation of the ordinance. As to the vagueness, the alleged charge of vagueness, the Court is of the opinion that the defendant was fully apprised of the facts under which he was charged. He was so advised at all stages of the proceedings, particularly at the commencement of the trial and through the proceedings thereupon and had very able counsel representing the defendant. The Court holds that the charge in the ordinance was not vague and was sufficiently adequate to indicate the elements that the defendant was apprised of, and the Court holds that the charges and the elements in that ordinance were such that they were proved well beyond a clear preponderance of the evidence in this case. And the Court, as a matter of fact, gave the instructions that both sides wanted as to evidence and as to the weight to be given to the evidence as to the elements.

As to the constitutionality of the ordinance, the Court holds that the ordinance as set forth and under which

the defendant was charged, the ordinance was constitutional.

Having disposed of all of the matters, and the Court is of the opinion that it's not necessary to have any other additional data, feels that the record is very complete and that the arguments are pretty well preserved.

The Court is of the opinion that nothing further need be presented to the Court and therefore the Court is not asking for any other matters.

Therefore, having passed on all of the matters that have come before the Court and, of course, the Court need not comment on those matters that have been presented to the Court, including the affidavits of certain parties and certain other complaints since the defendant has not urged or argued those matters, although he has preserved it as a matter of record, the Court need not pass on that or need not make any comment—

Mr. Elden: Excuse me, your Honor. I wish you would rule on it even if you rule against me.

The Court: I also indicate while there has been no argument presented to me on that point, I have reviewed those points as well and I have reviewed the affidavits, and the Court will state, one, that the Court did not participate, had no knowledge, and didn't discuss anything with respect to any alleged negotiations between counsels or the parties with respect to whether the charges would be dropped in consideration of some matters. This is the first time that the Court has—its attention has been called to it. It played no part in the role of this Court in the conduct of the case.

Mr. Mooradian: I didn't get a chance to read it.

The Court: It states that you made negotiations that you were willing to do certain things to drop the charges in consideration that Renault Robinson, the defendant, would drop other charges, but—

Mr. Mooradian: That's not true.

The Court: In the Federal Court, but merely, I do not—the Court was not aware of it and the first time was aware of it today as brought in by your motion for a new trial.

Mr. Elden: And Paragraph 12 of my motion which referred to that problem—

The Court: Yes.

That at no time up to this point was the Court let in on any discussion with respect to such alleged negotiations or what not.

Mr. Mooradian: There was only plea bargaining on plea of guilty.

The Court: But the Court indicates that it had nothing whatsoever to do with that and the Court rules that with respect to these proceedings that whatever negotiations took place by the counsels and the defendants with their counsel and the City—of course, would have no bearing on this case and the test would be whether the defendant received a fair trial or whether those affidavits in those proceedings did affect a fair trial.

The Court denies that motion because the Court states that it had no bearing on the conduct of the parties nor was there any error presented as far as the Court is aware with respect to that phase of it.

Further, the Court holds that the trial—there was an attempt of the Court to conduct the trial as fairly as possible for both sides and that the Court felt that both sides while they pursued their matters in a hard fashion, because it was apparently a hard case, the Court feels that both sides—both able counsel presented the case in a professional manner, fighting for the rights of their clients. So that with respect to the affidavits, that will be denied.

Since there is nothing further before the Court, this proceedings—this takes care of all motions pending.

Mr. Elden: I'm required to file a notice of appeal, which I have prepared.

The Court: Yes.

Mr. Mooradian: Your Honor, I'm reading this right now.

On at least one occasion I asked if I would be fired even if the prosecution was dropped. This is simply to find out how far the Police Department would go—

Mr. Elden: Well. that's—

Mr. Mooradian: Wait a minute. I'm reading. There are accusations.

> "Mr. Mooradian told me at a later meeting that he talked to Conlisk and gave me an assurance I would not be fired—"

I'm going on record I never had a conversation with Mr. Conlisk as to whether or not he would fire Mr. Robinson or not. The only conversation was plea bargaining and that was as to whether or not Mr. Robinson would take a plea of guilty.

The Court: All right. Your record is made.

Mr. Mooradian: This affidavit goes against me.

The Court: You never came before the Court in chambers.

Mr. Mooradian: No way.

The Court: Or in the court itself, in or outside.

Mr. Mooradian: I'm surprised at the affidavit. I didn't think Kermit would stoop to something that low.

Mr. Elden: For the purpose of the record, Mr. Mooradian thinks it's an important point, we are prepared to present other witnesses. If he thinks it's important, perhaps we can make a full record.

The Court: He doesn't decide what is important.

Mr. Mooradian: I'm just objecting on the record.

The Court: He doesn't decide, the Court decides.

I already ruled on it. If he made his record, that's it.

(Page 61, line 7 to page 68, line 4, of report of proceedings on February 26, 1973.)

APPENDIX C

47995

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

CLELL L. WOODS
CLERK

January 23, 1976

TELEPHONE
AREA CODE 217
782-2035

G.M.E.
RECEIVED

Mr. Gary M. Elden
Attorney at Law
200 E. Randolph Drive
Chicago, Illinois 60601

No. 47995 - City of Chicago, a Municipal Corporation, respondent, vs. Renault Robinson, petitioner.
Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX D

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

FILED
APPELLATE COURT
2/23 .976
LESLIE V. BECK
CLERK

CITY OF CHICAGO,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 58942
	)	
RENAULT ROBINSON,	)	
	)	
Defendant-Appellant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Renault Robinson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Court of the State of Illinois, affirming the judgment imposing a civil penalty upon appellant, entered September 9, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Gary M. Elden
200 E. Randolph Drive
Suite 5900
Chicago, Illinois 60601
Counsel for Appellant

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF ILLINOIS

CITY OF CHICAGO,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 47995
	)	
RENAULT ROBINSON,	)	
	)	
Defendant-Appellant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Renault Robinson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois denying appellant's Petition for Appeal as a Matter of Right, entered on January 23, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Gary M. Elden
200 E. Randolph Drive
Suite 5900
Chicago, Illinois 60601
Counsel for Appellant

APPENDIX F

Enactments Involved

Municipal Code of the City of Chicago, ch. 193

193-1. A person commits disorderly conduct when he knowingly:

(a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace;* or

(b) Does or makes any unreasonable or offensive act, utterance, gesture or display which, under the circumstances, creates a clear and present danger of a breach of peace or imminent threat of violence; or

(c) Refuses or fails to cease and desist any peaceful conduct or activity likely to produce a breach of peace where there is an imminent threat of violence, and where the police have made all reasonable efforts to protect the otherwise peaceful conduct and activity, and have requested that said conduct and activity be stopped and explained the request if there be time; or

(d) Fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm; or

* * *

* Appellant was charged only under section 193-1(a).

(g) Appears in any public place manifestly under the influence of alcohol, . . . not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity; or

(h) Carries in a threatening or menacing manner, without authority of law, any pistol, revolver . . . or other dangerous weapon, or conceals said weapon on or about the person . . .

* * *

A person convicted of disorderly conduct shall be fined not less than $5.00 nor more than $500.00 for each offense.

* * *

193-1.4. A person commits trespass when he knowingly:

(a) Enters the property, or any part thereof, of another when, immediately prior to such entry, he receives notice, either oral or written, from the owner or occupant that such entry is forbidden; or

(b) Remains upon the property, or any part thereof, of another after receiving notice, either oral or written, from the owner or occupant to depart. . . .

* * *

Any person convicted of trespass shall be fined not less than $5.00 nor more than $500.00.

Civil Practice Act of the State of Illinois, Illinois Revised Statutes, ch. 110

§ 68.1(2) Relief desired after trial in jury cases, heretofore sought by reserved motions for directed verdict or motions for judgment non obstante veredicto, for judgment notwithstanding the verdict, in arrest of judgment or for new trial, must be sought in a single post-trial motion. . . . The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief. . . .

Supreme Court, U. S.
FILED
MAY 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1430

RENAULT ROBINSON,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

On Appeal From The Illinois Appellate Court

MOTION TO DISMISS OR AFFIRM

WILLIAM R. QUINLAN
Corporation Counsel of the City of Chicago
511 City Hall, Chicago, Illinois 60602
Attorney for Appellee

DANIEL PASCALE
RICHARD F. FRIEDMAN
Assistant Corporation Counsel
Of Counsel

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

TABLE OF CONTENTS

PAGE

MOTION 1

QUESTIONS PRESENTED 2

STATEMENT 3

ARGUMENT:

I.

Under State Law, The Appellant Waived The Question Of Discriminatory Prosecution; No Substantial Federal Issue Is Presented In Any Case; The Claim Is Frivolous 8

II.

The Ordinance Is Not Unconstitutionally Vague, Since As Construed, It Prohibits The Appellant's Conduct; No Substantial First Amendment Question Is Presented 14

CONCLUSION 20

LIST OF AUTHORITIES CITED

Cases

Chicago v. Exchange National Bank, 64 Ill. App. 2d 455, 464 (1965) 10

City of Chicago v. Morris, 47 Ill. 2d 226, 231 (1970) .. 15, 18

Colten v. Kentucky, 407 U.S. 104 (1972) 16, 18

Davis v. United States, 411 U.S. 233, 241 ..... 11, 12

Dixon v. District of Columbia, 394 F. 2d 967 (D.C. Cir. 1968) 12

Estelle v. Williams, ... U.S. ..... (74-676, May 3, 1976) 11

Francis v. Henderson, ... U.S. ..... (74-5808, May 3, 1976) 11

Fugate v. Sears, Roebuck & Co., 12 Ill. App. 3d 656, 674 (1974) 10

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) 14, 15, 17

Lehman v. City of Shaker Heights, 418 U.S. 298, 305, 307 (1974) 19

Norwell v. City of Cincinnati, 414 U.S. 14 (1973) 18

People ex rel. Drury v. Catholic Homes Bureau, 34 Ill. 2d 84, 97 (1966) 10

United States v. Falk, 479 F. 2d 616, 621 (7th Cir. 1973) 12

United States v. Woodard, 376 F. 2d 136, 139 (7th Cir. 1967) 15, 17

Statutes

Illinois Criminal Code, sec. 26-1(a)(1) (Ill. Rev. Stat. 1975, ch. 38, par. 26-1(a)(1)) 15

Illinois Supreme Court, Rule 68.1 (Ill. Rev. Stat. 1971, ch. 110A, par. 68.1) 10

Municipal Code of Chicago, Illinois, Chapter 193, section 193-1(a) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1430

RENAULT ROBINSON,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

On Appeal From The Illinois Appellate Court

MOTION TO DISMISS OR AFFIRM

MOTION

The City of Chicago, appellee herein, moves that appellant's appeal be dismissed for failure to present a substantial federal question. In the alternative, the appellee moves that the opinion of the Illinois Appellate Court be summarily affirmed because it is in accord with prior decisions of this court and those rendered by the courts of Illinois.

QUESTIONS PRESENTED

Whether appellant's claim of discriminatory prosecution was denied on adequate state grounds, since appellant failed to present such a claim prior to judgment in the trial court.

Whether the plea bargaining discussions, during which appellant was represented by counsel and which appellant stated he did not take seriously, constituted a violation of appellant's federally guaranteed rights.

Whether the federal Constitution prohibits the arresting of an uncooperative person suspected of harboring a concealed weapon who creates a disturbance by arguing loudly with investigating police officers in the lobby and in the auditorium of a theatre during the presentation of a play.

Whether an ordinance prohibiting an act in "such an unreasonable manner as to provoke, make or aid in making a breach of peace" is unconstitutionally vague in its application in circumstances where the defendant, suspected of harboring a concealed weapon, loudly argued with investigating officers in the lobby and auditorium of a theatre during a performance.

STATEMENT

Evidence was presented at the trial from which the jury could conclude* that the appellant, Renault Robinson, refused to identify himself to police officers investigating a complaint that he was carrying a pistol, but instead argued loudly with them in the lobby of a theater. The evidence showed that Robinson avoided the investigating officers by entering the auditorium of a theater for which he had no tickets during the performance of a play. He jostled aside a uniformed theater security guard to get into the theater, and continued arguing with the investigating officers in the auditorium and again outside it. Patrons attending the play were disturbed to the point of having to leave their seats and go outside to find out what the commotion was. Upon the jury finding of guilt, the court entered judgment, which the Illinois Appellate Court affirmed, that Robinson was guilty of committing "any act in such unreasonable manner as to provoke, make or aid in making a breach of peace." The Municipal Code of Chicago, Chapter 193, Section 193-1(a).

These events occurred in the Goodman Theatre which contains a small studio (student) theater and a large professional theater, both sharing a common foyer. On the night of appellant's arrest, some 850 people were attending the performances being given in both theaters, including "Man in the Glass Booth" presented in the professional theater. Reserved seat tickets were required for the professional theater, but seats were not reserved in the studio theater, and on the evening in question, the public was invited even without tickets.

* The appellant does not challenge the jury's verdict as being against the weight of evidence.

Just before the intermission scheduled for both performances, Robinson, a suspended police officer, appeared with his wife and an off-duty policeman. The ticket taker stated that when he asked Robinson for tickets, Robinson made several unintelligible remarks. The ticket taker noted that Robinson's diction was slurred, that he appeared to have been drinking and that the group was boisterous. As Robinson fumbled for tickets, and opened his suitcoat, the ticket taker stated, he noticed a gun stuck in the waistband of Robinson's slacks. The manager of the theater was present in the lobby and his testimony corroborated the ticket taker's description of the group's behavior.

Renault Robinson told the ticket taker that he had supplied material being used in the studio theatre presentation and had been given the tickets for the studio theater play. The ticket taker asked the group to remain in the lobby because only a few minutes remained until intermission. Despite the request, the group entered the studio theater.

After conferring with the theater's security guard, the ticket taker called the police. Initially, three officers responded to investigate the theater's report of a man with a gun. As the intermission was ending, the three officers entered the studio theater where Robinson's party was taking seats. The uniformed officer approached Robinson first, and then the two plain clothes officers observed, they testified, Robinson passing a weapon to his wife.* One officer grabbed Robinson's arm, and in the process pushed Mrs. Robinson, who fell.

---

* It is undisputed that by departmental rule, off-duty Chicago Police Officers are required to carry their weapons. Robinson at the time of the incident was not so entitled, being under suspension.

Thereafter the entire party went into the corridor between the two theaters. The officers testified that on the way out of the theater after the attempt to pass off the gun, Mr. Robinson shouted, "Who is that fat pig, mother fucker, in the blue sportcoat who pushed my wife?"

When the party reached the lobby, they were approached by Sergeant Clancy, who had also been summoned by the "man with a gun" call. The sergeant, as officer in charge, asked the defendant and his friends for identification. Mr. Robinson refused to identify himself. He also failed to answer in any responsive way any of the sergeant's questions. Several times Robinson walked away from Sgt. Clancy and opened the doors to the large theater where "Glass Booth" was being performed. During this time Robinson was shouting, and also called the sergeant a "white mother fucker." A theater security guard testified that Robinson was loud and he could be heard inside the auditorium. While in the corridor, several persons from inside the large theater walked out to find out what was causing the commotion. "The Man in the Glass Booth" is a play depending for dramatic effect on periods of silence.

Without satisfying Clancy that he had no weapon and without establishing he was a police officer, Robinson entered the professional auditorium for which he had no ticket. In the process Robinson jostled an assistant theater manager aside. Robinson took a seat in the theater. The sergeant followed Mr. Robinson and ordered him to leave. Sergeant Clancy testified that his order was to leave the theater (in the sense of that particular auditorium) and return to the lobby. The ticket taker also was there and told Robinson to return to the lobby several times. The security guard also stated that the police order was to go back into the lobby because

Robinson was interrupting the show. At about this time Mr. Robinson turned to Sgt. Clancy and said something to the effect of "what do you need all these fucking pigs here for just the two of us?" Sergeant Clancy, who had not as yet elicited any proof from Robinson that the latter was a police officer, nor determined whether the defendant did or did not have a gun, ordered the defendant back into the lobby. He refused to obey Clancy's order. Sergeant Clancy repeated his order several times. The group finally proceeded back into the lobby.

From the time of Robinson's first contact with the police to his arrest, from 10 to 20 minutes elapsed, and three to five minutes of that time was spent in the professional theater. In contrast to the inferences made by appellant, he, his companion and Mrs. Robinson were not searched until after the arrest.* No guns were found on Mr. Robinson's person but two were found to be carried by his companion, Nathan Silas. Although Mr. Silas stated that both of the guns were his, he also testified that of those policemen who carry guns, the usual practice is for each to be holstered. Mr. Silas had but one holster, and one of the guns was in the waistband of his slacks under his sweater.

Judgment upon the jury's finding of guilty was entered October 26, 1972. Robinson indicated that he wished to file post trial motions, and the court set February 26, 1973 as the date for argument upon said motions. On February 20, 1976 appellant filed alternative motions for judgment n.o.v., in arrest of judgment and for a new trial. The motions stated, without supporting affidavits and without supporting allegations of

* Mr. Robinson stated he opened his suit coat to show he had no weapon. However, this did not show a weapon was not concealed elsewhere on his person.

fact, that the prosecution was discriminatory. Allegations of fact were not supplied until the date of argument. At that time appellant filed in the trial court his own affidavit and that of five police officers.

Mr. Robinson's affidavit and accompanying documents purported to show that he had had many disagreements with the department of police concerning policy. However no witness testifying at trial who was present in the theater when the incident occurred stated that he knew Robinson previously or knew anything about him.

A federal complaint was attached to the post-trial affidavits, showing that subsequent to the arrest but prior to his conviction Robinson had filed a civil rights action in the federal district court complaining of the department, its policies and its treatment of him. The affidavit also claimed that at unspecified times during the disorderly conduct trial, the prosecutor had approached him and his attorney to discuss the possibility of settlement of the two lawsuits by dismissing both of them. The affidavit also stated, paragraph 5, "on at least one occasion, I asked Mr. Mooradian [the prosecutor] whether I might be fired even if the prosecution were dropped. I asked him this simply to find out how far the police department and City of Chicago would go in attempting to encourage me to drop my federal lawsuit. I at no time intended to be a party to the trade-off suggested."

The February 26, 1973 documents also contained affidavits from five police officers. The affidavits incorporated a narrative statement purporting to contain all of the facts of the Robinson arrest. The officers' affidavits indicated that they believed no person would have been prosecuted for the kind of disturbance in a theater caused by Robinson.

ARGUMENT

I.

UNDER STATE LAW, THE APPELLANT WAIVED THE QUESTION OF DISCRIMINATORY PROSECUTION; NO SUBSTANTIAL FEDERAL ISSUE IS PRESENTED IN ANY CASE; THE CLAIM IS FRIVOLOUS.

The appellant did not raise his discriminatory prosecution claims during pre-trial proceedings, during the first jury trial, during the second jury trial following a hung jury in the first trial or in any motions prior to the judgment. Only in a post trial motion filed four days before scheduled argument, supported by allegations of facts set out in affidavits filed the day of argument upon his post trial motion, did Robinson first assert his discrimination claims.

In the state appellate proceedings, and here, Jurisdictional Statement, p. 16, Robinson claimed he could not raise the discriminatory prosecution issue earlier, since it was not until after entry of judgment upon the verdict that he could have known the character of the City's prosecution. Nevertheless, it is clear that Robinson was able to know from the beginning the factual matters he asserted in his post judgment motions. And certainly he knew, after the initial hung jury, the character of the City's case. One of his claims was that no person, absent a police department vendetta, would have been arrested and tried upon a charge of creating a disturbance in a theater during a performance. The arrest was made, he argues, and the prosecution commenced and continued despite a hung jury only because the defendant happened to be Renault Robinson, a person who in the past had

disagreed with certain departmental policies. The five affidavits filed in support of the claim were signed by police officers of patrol rank, the same as that of Robinson. They stated that, in their experience, it was not departmental policy to make arrests of persons behaving as Robinson did in the theater and that certainly no prosecution would result from such an arrest.

Such facts, if true, were within the appellant's knowledge from the outset. As an experienced officer of the same rank of the affiants, he was able to know what departmental policy was and the manner it was carried out. The information contained in the post trial motions and the affidavits was clearly available to him prior to and during the disorderly conduct trials.

The same thing is true of the coercion issue. In his post trial motion and in his own affidavit filed the day of argument, the appellant claimed that the prosecutor's discussions of dropping both the disorderly conduct prosecution and the appellant's federal claims against the department were evidence of the discrimination and departmental vendetta. Knowledge of this circumstance was obviously within appellant's own ken. He stated that he was present during the discussions and that they occurred at an unspecified date, but clearly prior to the jury verdict. Obviously, Robinson was in the best position to know of the City's offer; and it may not be said that these were facts unavailable to the appellant until after the judgment was entered. Although he knew of the alleged coercive conduct by the City attorney, he chose not to make it known at any time during the course of the trial until after the jury had rendered its adverse verdict and during the presentation of his post trial motions.

In his Jurisdictional Statement, p. 15, appellant notes that his post trial motions were filed pursuant to Illinois Supreme Court Rule 68.1(2) (Ill. Rev. Stat. 1971 ch. 110(A), section 68.1(2)). He states that nothing in that rule requires raising the claimed federal constitutional defenses during the trial.

But Illinois law requires that parties present all evidence available to them during the course of the trial. Post trial motions based on evidence not introduced at trial must show that that the evidence is newly discovered and not available to the party during trial.

The Illinois Supreme Court has stated:

> A primary requisite to allowance of a motion for a new trial under section 68.1 on the grounds of newly discovered evidence is that such evidence was not discoverable prior to trial by the exercise of ordinary diligence. [Citing cases.] We see no reason to distinguish between jury and non-jury cases in this regard, particularly where, as here, the evidence upon which the motion was based not only was discoverable but was actually known prior to the original trial. [*People ex rel. Drury v. Catholic Homes Bureau*, 34 Ill. 2d 84, 97 (1966).]

In particular, the Illinois rule does not permit affidavits to be filed unless truly new matter is presented:

> In support of its motion for a new trial, the defendant offered two affidavits. The court denied the motion for a new trial and ordered that the affidavits be stricken. The court did not err in refusing to consider these affidavits. The matter set out therein was discoverable prior to trial upon the exercise of reasonable diligence. [*Chicago v. Exchange National Bank*, 64 Ill. App. 2d 455, 465 (1965); *See also Fugate v. Sears, Roebuck & Co.*, 12 Ill. App. 3d 656, 674 (1974).]

Not only is the failure to assert discriminatory prosecution and to present facts supporting the charge during trial a waiver of the question under Illinois law, it is no violation of the Federal Constitution for a court to refuse to consider such untimely matter. This Court has recently ruled that in federal habeas corpus proceedings, defendants who have been represented by counsel may be deemed to have waived errors of constitutional dimension if not raised in a timely manner. In *Francis v. Henderson*, ... U.S. ..... (74-5808, May 3, 1976) this Court stated that if state law required a defendant to challenge a grand jury array prior to trial but the defendant, represented by counsel, failed to do so in accordance with that state procedure, the defendant may not raise the issue in a habeas corpus proceeding. This was true even though the error complained of, if proven, would have invalidated the grand jury proceeding upon constitutional grounds. Similarly, in *Estelle v. Williams*, ... U.S. ..... (74-676 May 3, 1976), this Court noted that, although it is error of constitutional dimension to require a defendant to appear at a jury trial clothed in prison garments, the defendant, represented by counsel, who failed to raise the issue to the trial court was deemed to have waived it.

The principle requiring defendants who are represented by counsel and who are possessed of all the facts to raise objections and errors at the proper time or have them considered waived is not new. This principle was stated in *Davis v. United States*, 411 U.S. 233, 241:

> The waiver provisions of Rule 12 (b)(2) are operative only with respect to claims of defect in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone

> to the burden and expense of a trial. If defendant were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that another claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

The appellant was aware of all the facts he ultimately presented to the trial court in support of his charge of discriminatory prosecution. Although he was represented by counsel throughout the entire proceedings, it was not until after judgment was entered upon the verdict of guilty, and then not until the day of oral argument upon post trial motions, that the appellant favored the court with his discrimination allegations. The criminal justice system was not intended to permit a defendant to hold defenses in reserve for use in case an adverse judgment is returned and then present them in a piecemeal fashion.

The Courts of Appeals cases relied on by appellant do not help him. In *United States v. Falk*, 479 F. 2d 616, 621 (7th Cir. 1973) the defendant raised the question of discrimination at the proper time, in pretrial motions and during the trial court proceedings; in *Dixon v. District of Columbia*, 394 F. 2d 967 (D.C. Cir. 1968), the defendant only discovered the facts supporting a claim of discrimination for the first time during a pretrial conference in the District of Columbia Court of Appeals. He raised the issue there. In each case the issue was timely raised as soon as the facts were known.

Aside from the issue of waiver, the appellants' claim of discriminatory prosecution is insubstantial on the merits. The potential danger allegedly occurring because of the City attorney's discussion with the appellant concerning mutual dismissal of the actions is that a person may be arrested and have prosecution begun for an impermissible purpose, to coerce him into waiving a right. That danger is not presented here, since the City's case against Robinson was not initiated to force Robinson's dismissal of the federal case. This is true because Robinson's federal case was not filed until some seven months following the disorderly conduct arrest. It should be further noted that no witness testified at the trial, and Robinson did not allege at the trial, that any of the persons employed by the theater initiating the disorderly conduct complaint or that any of the arresting officers present at the theater knew Robinson or knew about his disagreements with his employer. Indeed, there was evidence at the trial to show that Robinson refused to make his identity known to the arresting officer in charge.

Moreover, the settlement discussions did not have a coercive influence upon appellant. Discussions were held, as stated in his affidavit, in the presence of appellant's counsel. Moreover, he forthrightly stated that he did not intend to be a party to any proceedings, but only participated in the discussions "simply to find out how far the Police Department and City of Chicago would go."

Appellant's claim that his offense was so trivial that the police department practice was neither to arrest nor prosecute it is frivolous on its face. Disturbing the performance of a play is not trivial. Moreover, the appellant's arrest by persons who did not know his iden-

tity or employment history belies the alleged practice of ignoring such violations. And, as the Illinois Appellate Court pointed out, the five affidavits of fellow police officers stating what they considered the City's practice to be were not based upon all the facts of Robinson's arrest. Jurisdictional Statement, p. 11a.

II.

THE ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE, SINCE AS CONSTRUED, IT PROHIBITS THE APPELLANT'S CONDUCT; NO SUBSTANTIAL FIRST AMENDMENT QUESTION IS PRESENTED.

The only novelty presented by the present appeal is the phrasing of appellant's question, whether an ordinance may be "void for vagueness . . . as applied." Jurisdictional Statement, p. 4. However, no substantial or novel legal question is presented, since the Illinois Supreme Court has applied the ordinance or similar ones in nearly identical situations, and this Court has upheld similar disorderly conduct laws where actual disturbances have been created.

A disorderly conduct law is not unconstitutional because it does not, or cannot, catalogue every conceivable sort of human activity that might conceivably come within the purview of such laws. This court noted in *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) that, "condemned to the use of words, we can never expect mathematical certainty from our language." The test measuring whether conduct is impermissible under an ordinance prohibiting any "act [committed] in such unreasonable manner as to provoke, make or aid in making a breach of peace" is reasonableness of the conduct under the circumstances. This was the test articulated in the Illinois Appellate Court decision below, Jurisdictional Statement, p. 6a, as well as by the Illinois

Supreme Court in construing the present ordinance. Such a test was also approved by this Court.

In construing the instant ordinance, the Illinois Supreme Court has stated the test: "whether a violation has occurred is determined by the reasonableness of the conduct in relation to the surrounding circumstances." *City of Chicago v. Morris*, 47 Ill. 2d 226, 231 (1970). The Seventh Circuit Court of Appeals articulated the same test in construing the almost identical Illinois disorderly conduct statute.* The court stated "the emphasis of the statute is upon the tendency of the conduct to disturb others and to provoke disruption of public order and upon the unreasonableness of the activity when viewed in the context of the surrounding circumstances." *United States v. Woodard*, 376 F.2d 136, 139 (7th Cir. 1967).

This Court, too has upheld or articulated the test as taking into account the surrounding circumstances in deciding whether a defendant's conduct could be found to disturb the peace. The context of surrounding circumstances was the touchstone of the test articulated in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972):

> The nature of a place, "the pattern of its normal activity, dictate the kinds of regulation of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. The same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically incompatible with normal activity of a particular place at a particular time.* [Emphasis added, footnote omitted.]

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* A person commits disorderly conduct when he knowingly . . . does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace. Ill. Rev. Stat. 1975, ch. 38, section 26-1 (a)(1).

In *Colten v. Kentucky*, 407 U.S. 104 (1972), this court also upheld a disorderly conduct ordinance which prohibited activity committed "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof" because, as construed by the state court, it did not permit conviction of the defendant without a consideration of the attendant circumstances.

In the attendant circumstances of the instant case, appellant's conduct was, in the words of the ordinance, "unreasonably [done in a] manner as to provoke, make or aid in making a breach of peace." The circumstances were not a park or street, but in the foyer and auditorium of a theater during the performance of a play. And, rather than allaying the fears of a superior police officer that he was not a man carrying a gun, the appellant refused to identify himself, by name or office, but instead shouted insulting words at the theater employees and police officer present. He attempted to evade questioning by pulling open the doors to the auditorium where the play was in progress, and jostled aside a theater employee to gain entrance to the auditorium. His loud discussion continued for a time inside the theater auditorium. Patrons attending the play were disturbed, as witnessed by their appearance outside the auditorium to find out the cause of the disturbance. This kind of behavior, as found by the jury, was unreasonable in the context of a theater. The ordinance's application to the appellant was undoubted under the circumstances and under the constructions articulated above.

Appellant insists that as interpreted by Illinois courts, imminence of violence is necessary for a conviction for disturbance of the peace. This contention was not raised at trial, where the appellant had the opportunity, but failed, to submit an instruction to that effect.

Nevertheless, under the rulings of Illinois Supreme Court and this Court, imminence of violence is not necessary if there is a real and palpable disturbance or imminence of such disturbance. In *Grayned*, the court upheld an ordinance prohibiting "making of any noise or diversion which disturbs or attempts to disturb the peace or good order" of a school, stating (in circumstances where disruption of classes, but no violence was imminent) that:

> although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. [408 U.S. at 112.]

Of course in the instant case witnesses testified both to disruption of the play and of the persons in the foyer. In *United States v. Woodward*, as well, the Illinois disorderly conduct statute was held to govern conduct disturbing but not violent. In *Woodard*, there were two defendants, one who disrupted a Congressional hearing with shouts but without violence, and a second who created a disturbance by attempting to enter the hearing room which was closed for lunch and falling limp to the floor when guards refused to let him enter. Illinois law does not require violence in order to convict for breach of peace.

Appellant also contends that he cannot be convicted for merely disturbing a police officer by arguing with him. But that undoubted proposition is not relevant to the present case, where the appellant's unreasonable behavior disturbed theater personnel and patrons and where the appellant shouldered aside a theater security guard to gain entrance to the theater auditorium for which he had no ticket. The circumstance in the present

case distinguishes it from *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973) in which the arrestee shouted at and was uncooperative with the police in an on-the-street arrest. Moreover, both the Illinois Supreme Court and this Court have upheld breach of peace convictions involving disorderly *conduct* directed at police officers in appropriate circumstances. In *City of Chicago v. Morris*, *supra*, the Illinois Supreme Court upheld a conviction under the present ordinance where the defendant's arguing with a police officer had the potential of provoking a crowd of agitated bystanders and interfered with the officer's arrest of a suspect. That case was almost identical with the arrest upheld in *Colten v. Kentucky*, in which the defendant was convicted of conducting an argument which interfered with a police officer attempting to arrest a third person. It should be noted that in *Colten* there was no testimony that the defendant's behavior would provoke violence and there were no innocent third parties who were disturbed.

Thus, as construed by the Illinois Supreme Court, and as similar ordinances have been construed by this Court, the ordinance does not suffer from unconstitutional vagueness, since the circumstances of the arrest must be taken into account and the appellant's conduct was unreasonable in the circumstances of his arrest. Similarly, the ordinance does not suffer from overbreadth. The appellant asserts that the ordinance is "void for . . . overbreadth as applied." Presumably this means that the present ordinance was applied to suppress a permitted First Amendment activity.

At the outset it should be noted that the appellant's behavior, itself, was an interference with the presentation of a play, a First Amendment activity. Moreover, the ideological content of Robinson's epithets about the

police was nil. Whatever the value of the content of his language, it was his *conduct* which created a disturbance and interference with the play. Robinson's inconsiderate attitude in the foyer and in the auditorium of the theater is reiterated in his Jurisdictional Statement, in which he states "the right of a theatregoer not to hear another person talk in a theatre lobby during a play is of little weight. . . ." At the theatre, the professional presentation of a play is not a public forum open to all who wish to express views. As Mr. Justice Douglas pointed out in his concurrence in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 305, 307 (1974), "while petitioner clearly has a right to express his views to those who wish to listen he had no right to force his message upon an audience incapable of declining to receive it." Even if the appellant's behavior had been appropriate to the open air in the street or in the park, he was not privileged to carry his disregard for the police or protests about his being asked questions to the audience viewing a play. He certainly had no right to carry that argument into the interior of the theater during the performance. Appellant's First Amendment contentions, whether based upon his right to protest his being questioned by police officers or to express a view of the police department in general, did not override the right of the theatregoers to be free from this disturbance. In the context of his arrest, the application of the ordinance to the appellant did not abridge his right to speak or protest. His First Amendment argument is frivolous.

CONCLUSION

For these reasons the decision of the Illinois Appellate Court rests upon independent state law; moreover its decision is in accord with decisions of this Court. The appeal should be dismissed or summarily affirmed.

Respectfully submitted,

WILLIAM R. QUINLAN
Corporation Counsel of the City of Chicago
511 City Hall, Chicago, Illinois 60602
Attorney for Appellee

DANIEL PASCALE
RICHARD F. FRIEDMAN
Assistant Corporation Counsel
Of Counsel

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